no possibility of a real defence on a question of fact. (*Evelyn Saw Hee Li* v. *Gan Tit Sun*[3]).

In this case there are undoubtedly triable issues in law and in fact and therefore the defendant should be entitled to defend the suit.

The appeal is hereby allowed with costs.

Appeal allowed.

Solicitors: *Lim Huck Aik & Co.; Gan Teik Chee & Ho.*

PUBLIC PROSECUTOR v. PENGURUS, RICH FOOD PRODUCTS SDN. BHD.

[A.Cr.J. (Yusoff Mohamed J.) May 3, 1981]
[Johore Bahru — Criminal Appeal No. 12 of 1981]

Criminal Law and Procedure — Sale of Food and Drugs — Fish containing mercury — Whether strict liability offence — Scope of Sale of Food and Drugs Ordinance, 1952, s. 21.

The Inspector of Sale of Food and Drugs, Johore Bahru had taken possession of 6 packets of pure fish floss from a shopkeeper in the town on January 12, 1980. In compliance with the Ordinance he sent the fish floss to the Chemist for analysis. The Chemist's Report showed it to contain besides sugar, salt, bean sauce, vegetable oil, essence of taste, 1.7 parts per million of mercury. The Prosecution relied on the Chemist's Report when prosecuting the respondent. The respondent in her defence called the Chemist to testify on her behalf. The Chemist testified that all the ingredients used by the respondent did not contain mercury. He stated that the high content of mercury found in the floss came from the fish and met the other ingredients used in their natural state. He was also of the opinion that for the purpose of manufacturing fish floss, mercury had no useful function. He also said that unless mercury was deliberately introduced into the manufacture of fish floss, it could not have contained the high percentage of mercury as found in the floss.

The respondent said that she bought the fish for the purpose of manufacturing the said floss as well as all the ingredients used in its manufacture from the open market.

The learned magistrate acquitted the respondent on a charge under section 11(i)(b) of the Sale of Food and Drugs Ordinance 1952. He found that the respondent had taken all reasonable steps in ascertaining that the manufacture of the fish floss did not contain mercury as found after analysis. This was a home industry manufacturing the floss on a small scale for distribution locally. The learned magistrate also found that the respondent did not act wilfully and that it was not reasonable to impose on a small scale industrialist as the respondent the duty to employ a Chemist to analyse the food she produced before marketing them.

The prosecution appealed.

Held, dismissing the appeal: this is not a strict liability offence and whether there is a defence open to the respondent is a question of fact to be decided by the magistrate; there was no reason to interfere with the finding of facts by the learned magistrate.

CRIMINAL APPEAL.

John O'Hara (Deputy Public Prosecutor) for the appellant.

Lai Poh Fye for the respondent.

Cur. Adv. Vult.

Yusoff Mohamed J.: This is an appeal by the Public Prosecutor against acquittal of the respondent Khor Get Kee, Pengurus, Rich Food Products Sendirian Berhad, Johore Bahru on a charge under section 11(1)(b) of the Sale of Food and Drugs Ordinance, 1952 for selling fish floss with label attached thereto not describing the contents which included among others, 1.7 parts per million of mercury, punishable under section 11(4) of the Ordinance.

The facts show that the Inspector of Sale of Food and Drugs, Johore Bahru had taken possession of 6 packets of pure fish floss from a shopkeeper in the town on January 12, 1980. In compliance with the Ordinance, he sent the fish floss to the Chemist for analysis. The Chemist's Report shows that the fish floss, besides containing sugar, salt, bean sauce, vegetable oil, essence of taste as described in the label, also contains 1.7 parts per million of mercury. The prosecution relied on the Chemist's report when prosecuting the respondent.

The respondent in her defence called the Chemist to testify on her behalf, who in his evidence said that he had examined all the ingredients used in the manufacture of the said fish floss and he found that all the ingredients used by the respondent did not contain mercury. In his opinion, the high content of mercury found in the floss came from the fish and not the other ingredients used in their natural state. He was also of the opinion that for the purpose of manufacturing fish floss, mercury has no useful function. He also said emphatically that unless mercury was deliberately introduced into the manufacture of fish floss, it cannot contain the high percentage of mercury as found in the floss.

The respondent said that she had bought the fish for the purpose of manufacturing the said floss as well as all the ingredients used in its manufacture from the open market.

Section 21 of Sale of Food and Drugs Ordinance provides a defence in that: —

"... it shall be no defence, that the defendant (respondent) did not act wilfully unless he also proves that he took all reasonable steps in ascertaining that the sale of the article would not constitute an offence against this Ordinance..."

This is not a strict liability offence and whether there is a defence open to the respondent under section 21 of the Ordinance is a question of fact to be decided by the Magistrate.

The learned Magistrate has found as a fact that the respondent had taken all reasonable steps in ascertaining that the manufacture of the fish floss did not contain mercury as found after analysis. This was a home industry manufacturing the floss on a small scale for distribution locally. The learned Magistrate also found that the respondent did not act wilfully and that it was not reasonable to impose on a small scale industrialist as the respondent, to employ a Chemist to analyse the food she produced before marketing them.

I see no reason to interfere with the finding of facts by the learned Magistrate and therefore dismiss this appeal.

Appeal dismissed.

Solicitors: *Jackson & Masacorale.*